01-22: Pre-Settled Status – UC – Effect of the Fratila and another v Secretary of State for Work and Pensions [2021] UKSC 53 Decision

INTRODUCTION

1. The purpose of this memo is to:

- inform DMs about a recent Supreme Court decision[1] which deals with the issue of whether or not the amendments made by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 to income-related benefits regulations[2] are discriminatory under EU law[3] and, if so, whether or not that discrimination was justified. The amendments in question provided that pre-settled status is not sufficient in itself to satisfy the legal part of the habitual residence test.
- instruct DMs to review and analyse lookalike case decisions that were previously subject to the stay of execution[4].

1 Fratila and another v Secretary of State for Work and Pensions [2021] UKSC 53;
2 reg. 21AA(3A)(a) IS (Gen) Regs 1987, Reg. 85A(3A)(a) JSA Regs 1996, reg. 2(3A)(a) SPC Reg 2002, reg. 10(3AA)(a) HB Regs 2006, reg. 10(4ZA)(a) HB (Persons who have attained the qualifying age for state pension credit) Regs 2006, reg. 70(3A)(a) ESA Regs 2008, reg. 9(3)(c)(i) UC Regs 2013;
3 Article 18 TFEU; 4 SS 98, s 25(5)

THE SUPREME COURT DECISION

Background

2. The claimants are Romanian nationals who came to the UK in 2014 and 2019. In 2019 each was granted limited leave to remain in the UK under the EU Settlement Scheme (also known as 'pre-settled status').

3. Having obtained pre-settled status, both claimants applied for Universal Credit. During the HRT interview it was determined the claimants had no qualifying right of residence except their pre-settled status. Both applications were therefore refused on the grounds that pre-settled status alone is not a right to reside which enables access to means-tested benefits[1].

1 UC Regs, reg 9(3)(c)(i)

4. The claimants argued that the provisions excluding pre-settled status as a qualifying right to reside that allowed access to means tested benefits were in breach of the EU right not to be discriminated against on the grounds of nationality, a right which has direct effect. The claimants requested that the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations 2019 be quashed.

What the High Court decided

5. The High Court (Swift J)[1] held that the claimants could rely upon Article 18 TFEU to protect themselves against unlawful discrimination on the grounds of nationality considering that they were EU nationals legally residing in the UK under domestic law (due to the acquisition of pre-settled status). However, the Court held that the provisions were held to be indirect and justified. Meaning it was therefore lawful to have such a requirement (para 32). The claimants also accepted that the legal basis for their claim fell away at the end of the transition period (para 15).

1 Fratila and Tanase v SSWP [2020] EWHC 998 (Admin)

What the Court of Appeal decided

6. The Court of Appeal determined that as they had been granted a right of residence under UK law, and that EU law still applied (as it did up to the end of the transition period on 31.12.20) the claimants could rely on the EU Treaty's prohibition on discrimination, including when it comes to accessing social assistance.

7. The Court found that CJEU case law had already determined that a person with a domestic form of residence could access social assistance. The claimants had a domestic form of residence, namely pre-settled status and therefore its exclusion was directly discriminatory[1]. This rule was directly discriminatory on the grounds of nationality and therefore unlawful as this type of discrimination cannot be justified under EU law. The decision of the Court of Appeal was limited to the interpretation of EU Law as it applied up to the end of the transition period on 31st December 2020[2]. The CoA granted a stay of execution pending the Supreme Court's decision on permission to appeal.

1 Martinez-Sala v Freistaat Bayern [1998] ECR I-0269, Grzelczyk v Centre Public d'Aide Sociale ["CPAS"] d'Ottognies Louvain la Neuve [2002] 1 CMLR 19, Trojani v CPAS de Bruxelles [2004] 3 CMLR 38, and Jobcenter Krefeld v JD C-181/19; 2 Para 26 of Fratila and Tanase v SSWP [2020] EWHC 998 (Admin)

8. On the 22.02.2021 the Secretary of State was granted permission to appeal this decision to the Supreme Court and a stay of execution was implemented[1] and extended pending the outcome.

1 SSA 98, s 25(5)

What the Supreme Court decided

9. The Supreme Court determined in paragraphs 10 - 12 that a previous case held by the CJEU had already determined the issue regarding direct discrimination of nationality under Article 18 TFEU[1]. It was accepted that the claimants did not reside in the United Kingdom in accordance with the Directive[2] at the time of the claim for Universal Credit. This meant that the claimants could not rely on the EU principle of non-discrimination to claim a right to equal treatment. Therefore, setting out that pre-settled status is not in itself a sufficient right of residence to access income related benefits, is not discriminatory.

1 CG v Department for Communities in Northern Ireland Case C-709/20;
2 Article 24 of Parliament and Council Directive 2004/38/EC

10. New grounds were raised by the claimants regarding the application of the Charter of Fundamental Rights of the European Union. In the judgment the Lords dismissed this new point, as it raised new issues of fact not previously determined. They further clarified this by distinguishing that the material facts of the case before them and CG[1] were materially different.

1 CG v Department for Communities in Northern Ireland Case C-709/20

Note – This judgment does not affect the amendments made in respect of pre-settled status for Zambrano carers, and such cases should continue to be assessed as they are currently. However, if such a case is appealed to the FtT, then please refer it to DMA (Leeds).

REVIEWING PREVIOUSLY STAYED CASES

11. The DM should review in detail a stayed decision on a claim to UC in respect of any case where the issue involves the refusal of benefit due to the claimant having no right to reside other than their pre-

settled status (limited leave to remain), and the application for the benefit was made prior to the end of the transition period.

12. If a claimant with pre-settled status has acquired an alternative right to reside since the date of initial claim, UC should be awarded from the date they became entitled, or a closed period supersession should be considered, if appropriate.

13. Equally, if a claimant previously applied for a revision or supersession of a disallowance decision on an application made before 31.12.2020, on the grounds that the Court of Appeal decision applied to them, these should now also be reviewed.

14. The only previous exception to this was in cases of a joint application where one claimant was eligible under the regulations and the other was not. To have stayed such a case would have meant denying benefit entitlement to someone who did not fall within the *Fratila* cohort. In that scenario, the case was not previously stayed[1], but a review of entitlement may still be required.

1 SSA 98, s 25(3)

15. The claimant should be reminded that no decision has been made on their claim, as the DM had exercised their power to stay, which has been previously communicated to them. They should then be made aware that as the Supreme Court has now made their decision, the stay will be lifted, and a decision will be made after a review of the case.

APPEALS

16. Where a lookalike case has already had a DM's decision and an appeal is received against that decision, the appeal should be referred to the FtT in the normal way, but the FtT should be advised that the lead case has now been concluded and what the decision of the Supreme Court was. Where an FtT has made a decision on a lookalike case, citing the Fratila Court of Appeal decision, the statement of reasons must be requested straight away, and the case referred to DMA (Leeds) as per standard procedure.

COMPLEX CASES

17. DMs may encounter cases where it is difficult to decide whether the case in front of them is a complex case. Such cases can be referred to DMA (Leeds) for advice.

APPLICATIONS TO BENEFIT FROM 01.01.2021

18. The Supreme Court decision in Fratila revises the Court of Appeal decision to quash the amendments made to the regulations for income-related benefits by the 2019 Regulations, as they deemed the amendments to be lawful. Claims made after 01/01/2021 should follow normal BAU processes.

ANNOTATIONS

The number of this Memo should be noted against the following ADM paragraphs - C1872

CONTACTS

If you have any queries about this memo, please write to Decision Making and Appeals (DMA) Leeds, 3E zone E, Quarry House, Leeds. Existing arrangements for such referrals should be followed, as set out in – Memo 7/19 Requesting case guidance from DMA Leeds for all benefits.

DMA (Leeds): January 2022